Supreme Court, U.S.
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No. 95-651

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOANN BENTON AHMED,
a/k/a Joe Gresham, As Personal Representative
for the Estate of Jose L. Gresham,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) a District of Columbia Corporation;
CSX TRANSPORTATION, INCORPORATED,
a Virginia Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this case is of such imperative public importance as to justify deviation from normal appellate practice, where the Fourth Circuit Court of Appeals properly affirmed the dismissal of petitioner's survival action claim, on the ground that petitioner's action was precluded by a final judgment entered in an action in another court, in which the same petitioner was awarded damages exceeding $2.8 million dollars from the same defendants for the same damages claim arising from the exact same set of facts.

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NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK); CSX TRANSPORTATION, INCORPORATED,

Respondents.

BRIEF IN OPPOSITION

Respondents, NATIONAL RAILROAD PASSENGER CORPORATION ("AMTRAK") AND CSX TRANSPORTATION, INCORPORATED (collectively "defendants" or "respondents"), respectfully request that this Court deny petitioner's request for a writ of certiorari to review the Fourth Circuit Court of Appeals' opinion below. The opinion, dated July 27, 1995, is reprinted in the petition for certiorari at Appendix 1a.[1]

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[1] "Appendix" refers to the appendix to the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to S.C. Code Ann. § 15-5-90, cited in the petition for certiorari, this matter also involves Florida's Wrongful Death Act, Fla. Stat. ch. 768.16, *et seq.* Specifically, ch. 768.20 of Florida's Wrongful Death Act provides:

> The [wrongful death] action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified by this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

Fla. Stat., ch. 768.20 (West 1994).

STATEMENT OF THE CASE

On January 13, 1992, Joann Benton Ahmed ("petitioner" or "Ahmed"), decedent's oldest child, instituted an action in Florida state court (the "Florida action"), charging respondents Amtrak and CSX with negligence and seeking compensatory damages in connection with an accident involving a train derailment on July 31, 1991 that resulted in the death of Jose L. Gresham, petitioner's father. Proceeding under Florida's Wrongful Death Act, Fla. Stat. ch. 768.16, *et seq.*, Ms. Ahmed sued as Florida-appointed representative of both the

decedent's estate and the decedent's survivors, his seven adult children.

It was undisputed below that under Florida's Wrongful Death Act, when injury from a wrongful act or negligence results in death, Florida vests in one individual, the personal representative of the decedent's estate, the right and duty to pursue all damages in a single action covering all potential claims for relief on behalf of the estate and designated survivors. Fla. Stat. ch. 768.20. See *In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816-818 (5th Cir. 1988); Wilcox and Melville, THE COMPUTATION OF DAMAGES UNDER THE NEW WRONGFUL DEATH ACT, 26 U. Miami L. Rev. 737, 738 (1972). Florida's Wrongful Death Act, in effect merges or consolidates into one lawsuit both a survival action for personal injuries and a wrongful death action so as to avoid a multiplicity of suits. *Martin v. United Security Services, Inc.*, 314 So. 2d 765, 768-770 (Fla. 1975); *McKibben v. Mallory*, 293 So. 2d 48, 54 (Fla. 1974). (*See* JA 132-134, 207-212).[2]

On July 9, 1992, while the Florida litigation was pending, counsel for the parties to the Florida action executed a stipulation and agreement (the "Florida stipulation"), in order "to resolve the matter on an expedited basis." It was agreed that the plaintiffs would "forego any claim for punitive damages in Florida or any other State" in return for which respondents would not contest liability. The stipulation made clear that respondents still could "contest all issues with respect to damages and causation." The stipulation was to govern

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[2] "JA" refers to the joint appendix filed by the parties in the Fourth Circuit Court of Appeals in the appeal below.

"any action brought as a result of the death of Jose L. Gresham, whether it be in Florida or elsewhere." (JA 193-194)

On July 28, 1992, Ms. Ahmed, again acting as the estate's representative, commenced a second action in federal district court in South Carolina (the "South Carolina action"), charging the same defendants with negligence based on the same accident (JA 9-14, JA 20-25). This time petitioner purported to proceed under South Carolina's Survival Action Statute, S.C. Code Ann. § 15-5-90, for recovery of compensatory damages covering the decedent's conscious pain and suffering from the time of the accident until his death, as well as decedent's medical bills and funeral expenses (JA 9-14, JA 20-25).

Although respondents' answer did not specifically assert an affirmative defense based on the existence of the Florida action (see JA 26-29), respondents moved in April, 1993 to dismiss or stay the South Carolina action based on the pendency of the duplicative Florida action (JA 36-42). Respondents' moving papers specifically accused petitioner of an "improper effort to litigate" the same issues in two different forums and insisted that petitioners "could have, and should have" brought any survival action claims in Florida (JA 39, 40). Petitioner opposed respondents' dismissal motion, alleging that South Carolina, unlike Florida, had a Survival Statute (JA 63-65). Without explaining why this might be so, petitioner argued that "[t]he survival cause of action needs to be asserted . . . in South Carolina" (JA 64). Petitioner did not, however, oppose a stay of the South Carolina action pending entry of a judgment in the Florida action (JA 63). As a result, by Order dated June 10, 1993, the district court below stayed the South Carolina action "pending a resolution of the Florida litigation" (JA 89).

At no time after the stay of the South Carolina action in June, 1993 did petitioner ask the Florida state court to allow her to pursue recovery for decedent's pain and suffering based on South Carolina's Survival Statute. In the Florida action, she relied solely on Florida's Wrongful Death Act, which clearly prohibits such a recovery (JA 166-167, 175-181).

The Florida action was tried before a jury, and resulted in a final judgment which was entered in January 1994, awarding petitioner compensatory damages totalling $2,842,500, consisting of $42,500 for Mr. Gresham's estate and $400,000 for each of his seven children.

In early August 1994, respondents moved for summary judgment in the South Carolina action based on the preclusive effect of the $2.8 million judgment in the Florida action (JA 121-124). Respondents' motion papers below explained why full faith and credit principles required the application of Florida's law on *res judicata* and that, under Florida law, petitioner's separate survival action claim was barred, requiring dismissal of the South Carolina action (JA 123-139).

Petitioner's opposition did not contest respondents' analysis of full faith and credit and *res judicata* principles, but simply argued that: (1) respondents were barred from making the dismissal motion in the South Carolina action because of the Florida stipulation; (2) respondents waived their rights by not asserting *res judicata* as an affirmative defense; and (3) assuming South Carolina law applied, rather than Florida law, petitioner was entitled to pursue separate wrongful death and survival action claims (JA 141-149). To support petitioner's assertion as to the preclusive effect of the Florida stipulation, petitioner cited, as she does in her petition for certiorari, a self-serving affidavit of her Florida counsel purporting to

explain what the stipulation "contemplated" (Petition at 4-5; JA 143-144, 150-151, 157-159).[3]

On September 9, 1994, the district court held oral argument on respondents' motion for summary judgment (JA 205-253). During argument, the court elicited the following concessions from petitioner's counsel:

> **THE COURT:** Under the full faith and credit clause. . . I would have to look to the state of the final judgment to determine how they would apply that final judgment.
>
> **MR. FREEMAN:** That's correct. No. That's correct. We researched that, and we agree that Florida law would apply.
>
> **THE COURT:** So . . . you do agree with me that the Florida court, looking at its own final judgment in the wrongful death action, would dismiss a survival action like this brought in Florida?
>
> **MR. FREEMAN:** That's what the cases appear to indicate, Your Honor. (Emphasis added) (JA 211-212).

After hearing petitioner argue that the Florida stipulation barred respondents' *res judicata* motion, on the theory that to assert such a defense amounted to contesting liability, the

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[3] "Petition" refers to Ahmed's petition for certiorari.

district court had the following exchange with petitioner's counsel:

> **THE COURT:** . . . [N]ow you claim that when they come in to indicate to me you may not pursue your survival action, your survival action as a plaintiff, you say that is contesting liability.
>
> **MR. FREEMAN:** It is.
>
> **THE COURT:** So my question is, what happened [if] instead of filing the subsequent survival action in South Carolina, you just filed a wrongful death action in South Carolina . . . . If they came in and told me that full faith and credit applied, [do] you think that would be contesting liability?
>
> **MR. FREEMAN:** No, Your Honor, I don't. (Emphasis added) (JA 221).

The court later returned to the obvious analytical defect in petitioner's argument:

> **THE COURT:** . . . I understood you earlier to say that under the agreement these defendants could contest your bringing a wrongful death action in South Carolina.
>
> **MR. FREEMAN** : I think that.
>
> **THE COURT:** . . . What in the agreement would you say they cannot challenge you on the

> survival action, but they may challenge you on the wrongful death action?
>
> **MR. FREEMAN:** The agreement doesn't differentiate wrongful death and survival [sic]. Those terms are not in the agreement. (Emphasis added) (JA 244).

Petitioner's flawed argument faired no better when the district court approached the matter in a slightly different way:

> **THE COURT:** What in the agreement allows you to bring one survival action but not a second survival action? What in the agreement does that?
>
> **MR. FREEMAN:** Just - it is not in the Agreement. It is just in common sense, Your Honor. (Emphasis added) (JA 246).

Ultimately, petitioner's counsel explained simply that "you couldn't bring multiple wrongful death actions, because I don't believe . . . the outcome was in the contemplation of the parties when this [stipulation] was entered into." In response, the district court observed that "you don't get to the contemplation of the parties unless there's some ambiguity in the agreement." (JA 247).

In summarizing petitioner's position at the conclusion of the argument, the district court observed that it was "completely inconsistent" for petitioner to concede that *res judicata* could be asserted to defend against multiple wrongful death actions or to defend against multiple survival actions but could not be asserted to bar the particular survival action

petitioner had pursued, even though Florida law would bar just such an action (JA 248).

The district court thereupon granted summary judgment, concluding that as a matter of law, full faith and credit required the district court to look at the South Carolina action as the Florida court would and the Florida court would dismiss petitioner's separate survival action claim (JA 251). The district court further held that the Florida stipulation was not ambiguous on the issue of whether respondents had waived their *res judicata* defense and did not bar them from asserting this defense (JA 251-252).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's judgment. The court of appeals held that the South Carolina action was barred by Florida law and that under principles of *res judicata* summary judgment properly was granted. The court of appeals also held that the Florida stipulation was unambiguous and did not serve to prohibit respondents from asserting such a defense:

> Had the parties wished to preclude defendants from advancing a *res judicata* defense in the event Ahmed instituted a second action in another forum, they were free to draft an Agreement that clearly provided for this waiver. The parties did not do so, however, and we decline Ahmed's invitation to read the Florida Stipulation as if they had. The parties' intent as expressed in the unambiguous Agreement is controlling, regardless of any intention purportedly existing in their minds at the time of contracting. (Appendix 5a) (citation omitted).

Finally, the court of appeals found no actual prejudice to petitioner due to respondents' failure to assert the *res judicata* defense in their answer to the complaint (Appendix 6a). Petitioner later filed a petition for rehearing which the court of appeals denied (Appendix 10a-11a).

REASONS FOR DENYING THE WRIT

The district court did not depart from accepted and usual course of judicial proceedings, and the court of appeals did not remotely sanction such a departure by affirming the district court's judgment. Having recovered a judgment exceeding $2.8 million in the Florida action, petitioner cannot escape the application of full faith and credit and *res judicata* principles. Petitioner's contrary arguments are devoid of merit.

First, petitioner persists in claiming that when respondents agreed in the Florida stipulation not to "contest" liability, either "in Florida or elsewhere," respondents waived their right to assert a meritorious *res judicata* defense in the South Carolina action (see Petition at 4-6). The Florida stipulation, however, expressly reserved respondents' right to contest "all issues with respect to damages and causation" (emphasis added).

Petitioner's counsel repeatedly conceded below that the stipulation did not prevent respondents from contesting petitioner's right to assert either multiple wrongful death claims or multiple survival claims. These concessions implicitly acknowledged that a meritorious *res judicata* defense goes well beyond the narrow issue of contesting liability. It goes to the broader issue of whether a plaintiff may go from forum to

forum in an effort to reap repeated damage recoveries for the same accident.

Notably, when asked to reconcile petitioner counsel's concessions during argument with her "waiver" argument, petitioner's counsel was unable to cite to a single word in the Florida stipulation supporting her position and spoke instead of the so-called "contemplation of the parties." Moreover, petitioner has never pointed to any law -- in Florida or elsewhere -- suggesting that the Florida stipulation should be construed, not on the basis of its words, but on some self-serving, after-the-fact expression of what the agreement supposedly contemplated. Florida law, in fact, rejects any such proposition. Under Florida law, as in most, if not all other jurisdictions, the court must look first to the words in the contract, and absent an ambiguity, the actual language used is the best evidence of the intent of the parties and the plain meaning of that language controls. *Acceleration Nat'l Serv. Corp. v. Brickell Financial Serv. Motor Club*, 541 So. 2d 738, 739 (Fla. 3d DCA 1989) (and cases cited therein), *review denied*, 548 So. 2d 662 (Fla. 1989); *Boat Town U.S.A. v. Mercury Marine Division of Brunswick Corp.*, 364 So. 2d 15, 17 (Fla. 4th DCA 1978) (and cases cited therein). In Florida, contract provisions should be given their natural and most commonly understood meaning in the light of the subject matter and circumstances, and the language used should be read in common with the other contract provisions. *Gibbs v. Air Canada*, 810 F. 2d 1529, 1533 (11th Cir. 1987) (and Florida cases cited therein). *See also Int'l Erectors, Inc. v. Wilhoit Steel Erectors and Rental Serv.*, 400 F.2d 465, 467-468 (5th Cir. 1968) (and Florida cases cited therein). The parties' intention, as expressed in the contract, is controlling, regardless of the intention purportedly existing in the minds of

the parties. *Stokes v. Victory Hands Co.*, 128 So. 408, 410 (Fla. 1930).

The intent of the parties, as revealed in the Florida stipulation, is readily apparent and completely contradictory to petitioner's self-serving argument in her petition. Since "the parties [wanted] to resolve the matter on an expedited basis," respondents agreed not to contest negligence in connection with the July 31, 1991 derailment and petitioners, in exchange, agreed not to pursue a punitive damages claim (JA 85-86). Since the Florida action had only recently been commenced (see JA 85-86, 166), the stipulation sensibly protected against petitioner potentially nullifying the agreement by dropping the Florida action and starting all over again in another forum; it stated that the Florida stipulation would "govern any action brought as a result of the death of Jose L. Gresham whether it be in Florida or elsewhere" (emphasis added) (JA 86). At the time this stipulation was executed, however, there was no second action pending and the stipulation neither expressly contemplates a second action (in South Carolina or elsewhere), nor does it hint that the parties intended specifically to permit petitioner to recover damages under the laws of two different states in two different actions, notwithstanding applicable principles of *res judicata*.[4]

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[4] The stipulation, for example, does not say it will govern "all actions" brought in Florida "and elsewhere", let alone specifically refer to a contemplated South Carolina action to be pursued in tandem with, not instead of, the Florida action. Moreover, it would be odd for the stipulation to contemplate resolution of the dispute on an "expedited" basis, and yet also contemplate that petitioner would institute a second action in another forum and also be entitled to pursue that second action to judgment, notwithstanding a meritorious *res judicata* defense.

The Florida stipulation was executed by competent counsel. There is no great challenge to drafting a stipulation stating that respondents agreed to give up a *res judicata* defense in the event that petitioners were to start a second action in South Carolina. As the court of appeals observed, "[h]ad the parties wished to preclude defendants from advancing a *res judicata* defense in the event Ahmed instituted a second action in another forum, they were free to draft an Agreement that clearly provided for this waiver." (Appendix 5a). The stipulation, however, by its silence, reveals that the parties made no such agreement.

Moreover, Florida's legislature has clearly directed, as a matter of public policy, that a personal representative of a decedent's estate, like Ms. Ahmed, must pursue all damage claims in a single action. Fla. Stat. ch. 768.16, *et seq. See, e.g., Martin*, 314 So. 2d at 768-770; *McKibben*, 293 So. 2d at 54; *Florida Clarklift, Inc. v. Reutimann*, 323 So. 2d 640, 641 (Fla. 2d DCA), *cert. denied*, 336 So. 2d 1181 and 341 So. 2d 293 (Fla. 1976). *See also In re Air Crash*, 861 F.2d at 816-817. This Florida law made it even more incumbent on petitioner's counsel in the Florida action to clearly set forth any purported agreement whereby respondents would allow the Florida-appointed representative to pursue duplicative actions. Petitioner's counsel did no such thing.

The Florida stipulation in question is not ambiguous on the issue of *res judicata*. It does not remotely bar respondents from challenging petitioner's right to recover duplicative damages in two actions, notwithstanding Florida law that would bar a second action in South Carolina. By admitting that respondents are entitled to defeat multiple wrongful death actions and multiple survival actions, petitioner's counsel effectively conceded the meritlessness of her position.

Equally flawed is petitioner's contention that respondents waived their right to assert a *res judicata* defense by not setting it forth in their answer or interrogatory responses (*see* Petition at 6-7). It is well settled that amendments to pleadings are freely given when justice so requires. *Foman v. Davis*, 371 U.S. 178, 182 (1962). *See Island Creek Coal Co. v. Lake Shore Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (reversing district court's refusal to allow amendment in three-year old case when motion made several months before trial). Mere delay, unaccompanied by actual prejudice, bad faith, or futility, does not justify denying leave to amend. *Defender Ind., Inc. v. Northwestern Mutual Life Ins. Co.*, 938 F.2d 502, 508 (4th Cir. 1991). Absent prejudice, an amendment may even be granted during trial, after the close of petitioner's evidence. *Id.*

Here the district court had ample discretion to permit respondents' *res judicata* defense, particularly since petitioner received notice of the issue in April 1993 and never once alleged, or demonstrated, that she had been prejudiced by respondents' failure to raise this defense earlier. *See, e.g., Defender Ind. Inc.*, 938 F.2d at 508. Indeed, nothing Ahmed argues in her petition even addresses, let alone casts doubt on, the district court's ample discretion to permit a meritorious *res judicata* defense under the circumstances reflected by the record below.

Petitioner attempts to explain why her Florida action and her South Carolina action should not be viewed as duplicative by this Court (Petition at 5-6). This discussion, however, is irrelevant. Petitioner has conceded that under governing Florida law petitioner's judgment in the Florida action is *res judicata* with respect to petitioner's claims in the South Carolina action.

Finally, there is no merit to petitioner's argument that the lower court was "free" to apply South Carolina law, which she asserts would permit a separate survival action (Petition at 7-10). As petitioner's brief acknowledges, this argument rests on the faulty premise that respondents waived their meritorious *res judicata* defense (Petition at 7). There was no waiver.

Under well-settled law, which petitioner does not dispute, the determination of whether a state's judgment is preclusive is determined by reference to the law of the state where the judgment was rendered, not the law of the state where the second action is commenced. *Migra v. Warren City School Dist. Board of Ed.*, 465 U.S. 75, 81 (1984). *See Mears v. Town of Oxford, Md.*, 762 F.2d 368, 371 (4th Cir. 1985); *Sea Cabin v. City of North Myrtle Beach*, 828 F. Supp. 1241, 1248-1249 (D.S.C. 1993). This requirement applies with equal force when the second action is commenced in federal court based on diversity jurisdiction. *See, e.g., Radle v. Allstate Insur. Co.*, 758 F. Supp. 1464, 1467 (M.D. Fla. 1991) (Florida federal court applies Wisconsin law to determine preclusive effect of prior Wisconsin state court action). Florida law, therefore, not South Carolina law, determines the preclusive effect of the Florida judgment, and petitioner has conceded that under Florida law, her separate survival action would be barred by *res judicata*.

The petitioner could have asked the Florida court to apply South Carolina's Survival Statute in lieu of, or in addition to, Florida's Wrongful Death Act. *See, e.g., In re Air Crash*, 861 F.2d 814; *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d DCA 1981). But she did not. It is readily apparent why petitioner chose not to pursue that legal tack in the Florida action. At oral argument below, petitioner conceded that if she had pursued a survival action in

Florida based on South Carolina law, it would have been dismissed (JA 210-212).

Petitioner's concession was not surprising given the parade of cases demonstrating that the Florida state court, applying the "significant relationships test", would have flatly rejected the application of out-of-state law and would have applied only Florida's Wrongful Death Act. *See, e.g., Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983), *reh'g denied, Valsecchi v. Proprietors Ins. Co.*, 449 So. 2d 265 (Fla. 1984), *appeal after remand, Valsecchi v. Proprietors Ins. Co.*, 502 So. 2d 1310 (Fla. 1987) (Florida law applied to wrongful death of Florida residents who died in North Carolina plane crash); *Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d DCA 1983) (Florida Law applied to wrongful death of Florida residents who died in Maine auto accident); *Steele v. Southern Truck*, 397 So. 2d 1209 (West Virginia wrongful death laws applied where West Virginia resident died in this state even though respondent's principal place of business was in Florida and alleged negligence occurred in Florida). *Cf., In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106, 1119 (D. Mass. 1975) (Florida has paramount interest in applying its Wrongful Death Act where Florida resident was killed in Massachusetts air crash). Rather than raise the choice-of-law issue in Florida, and face certain failure, petitioner decided to slice her personal injury claims into two convenient pieces and dash into South Carolina district court, even as she proceeded to final judgment in the Florida action.

The law is not so easily twisted to suit a litigant's convenience. Under full faith and credit and *res judicata* principles, respondents were entitled to dismissal of petitioner's South Carolina action. Petitioner's vain attempt to

escape that result by claiming waiver was properly rejected by the district court, and the court of appeals was entirely correct to affirm the district court's judgment.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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